

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



# 76-1087

*To be argued by*  
GREGORY J. POTTER

B  
P/S

## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1087

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

BENNY ONG, WONG WAH, TOM HOM,  
and ALBERT YOUNG,

*Defendant-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

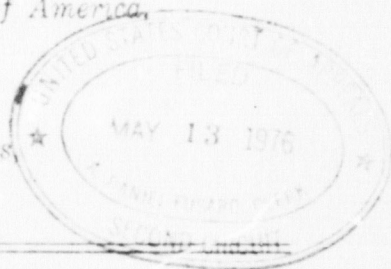
### BRIEF FOR THE UNITED STATES OF AMERICA

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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**Preliminary Statement**

Benny Ong, Wong Wah, Tom Hom, and Albert Young appeal from judgments of conviction entered on February 11, 1976 in the United States District Court for the Southern District of New York after a nine-day trial before the Honorable Charles L. Brieant, Jr., United States District Judge, and a jury.

Indictment 74 Cr. 1127, filed November 27, 1974, charged all defendants in Count One with conspiracy to bribe investigators of the Immigration and Naturalization Service (INS) in violation of Title 18, United States Code, Section 371. Additionally, defendants were charged with multiple counts of bribery of INS officials, in violation of Title 18, United States Code, Section 201(b) and 2.

Trial began on November 17, 1975. At the conclusion of the Government's case, Judge Brieant dismissed the conspiracy count as to Young. On November 28, 1975, the jury found defendants Ong, Wah and Hom guilty on all counts of the indictment in which they were charged and defendant Young guilty on all substantive counts in which he was charged.

On February 11, 1976, Judge Brieant sentenced defendant Ong to five years imprisonment on Count One, the conspiracy count, and eight years imprisonment on Counts Two through Sixty-one and Seventy-four through Seventy-eight, which sentences are to run concurrently. Wah was sentenced to concurrent terms of three and a half years imprisonment on Count One and on Counts Thirty-five through Sixty-three. Hom was sentenced to concurrent terms of three years imprisonment on Count One and on Counts Sixty-four through Seventy-eight. Young was sentenced to concurrent eighteen month terms of imprisonment on Counts Eighty through Ninety-nine and was also fined \$5000.

All defendants are released on bail pending appeal.

## **Statement of Facts**

### **The Government's Case**

#### **A. Summary.**

The evidence established overwhelmingly that in October 1973, Benny Ong, the manager of a Chinatown gambling establishment, approached INS investigators and offered substantial money bribes in return for the investigator's agreement to give Ong advance warning of INS raids to look for the presence of illegal aliens. The investigators, who immediately communicated the bribe

offer to their superior and to the FBI, were then outfitted with recording devices as they began accepting payoffs from Ong.

At the time Ong made his first payoff to the investigators, he introduced Wah, the manager of another local gambling establishment, who also provided the investigators with regular bribes in return for protection.

Thereafter, approximately one month after first receiving bribes from Ong and Wah, Albert Young, still another gambling house boss, approached the investigators and told them that he too would pay bribes if his establishment could receive the same protection that Ong's gambling house was receiving. Young then began making regular payments to the investigators.

In January 1974, the investigators were approached by still another gambling house manager, Hom. Hom, together with Ong, negotiated an agreement with the investigators whereby Hom would receive the same protection against INS raids as Ong in return for payments of the identical amount being made by Ong.

During the course of the investigation, numerous meetings between the investigators and defendants took place during which money was passed. Ong paid bribes totalling \$6000, Wah \$6200, Young \$5000, and Hom \$3000.

#### **B. Benny Ong's approach to the investigators and the resulting negotiations.**

On October 14, 1973 investigators Lawrence Granelli and Henry Brattlie of INS were confronted on Pell Street in lower Manhattan by defendant Ong who was the English-speaking secretary to the Hip Sing Asso-

ciation, a Chinese benevolent association with a branch in New York at 16 Pell Street. Ong motioned the investigators to join him, and a conversation then ensued in which Ong stated that he wanted to set up a meeting between local gambling house bosses and INS officials to work out an arrangement for checking illegal aliens in the gambling houses. (Tr. 62).<sup>\*</sup> The agents told Ong that they were not high-ranking officials and that they would have to speak to their boss about it. (Tr. 61-62).

Granelli then returned to his office, and spoke with his supervisor Owen Lyon, who suggested that the agents continue their negotiations with Ong. Later that evening Granelli and Investigator James Kibble met with Ong at the corner of Mott and Bayard Streets. (Tr. 63). Ong stated that he was on his way to the New York gambling house at 68 Mott Street, where, he had heard, INS officials had just arrested some illegal aliens. (Tr. 64). Ong told the investigators that he knew at least eight gambling house bosses who would be willing to pay \$200 each per week in exchange for INS officers calling them in advance of visits to the gambling houses. (Tr. 64-65). The investigators replied that they would have to talk to their boss about the proposition, and Ong replied that he would rather deal with the investigators themselves, since he didn't trust bosses. (Tr. 65).

The investigators promptly reported this conversation to Owen Lyon, their supervisor, and the matter was then referred to the Federal Bureau of Investigation. (Tr. 66). Special Agent Boyd Henry of the FBI was placed in charge of the investigation and supervised the

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<sup>\*</sup> References to numbers preceded by "Tr." are to pages in the trial transcript; "GX" refers to Government exhibits; "DX" to defense exhibits; and Br. for defendants' briefs.

activities of Investigators Granelli and Kibble. (Tr. 727-28). Approval was obtained from the Department of Justice for the use of recording equipment so that the investigators' meetings with Ong and others could be taped. (Tr. 729-31). Agent Henry also arranged for surveillance of certain meetings between the investigators and defendants and to take possession of the money paid to the investigators. (Tr. 747; GX 54).

On October 24, 1973, Granelli and Kibble once again encountered Ong. Ong approached the investigators, but Granelli told him he could not then talk, and Ong left. (Tr. 67). On November 6, 1973, the investigators met Ong in front of 17 Doyer Street, and shortly thereafter the investigators, with Ong, entered number 15 Pell Street and conversed in a meeting room. (Tr. 68-69). Granelli told Ong that his boss was interested in the bribe offer, but that he wanted to know why there were only eight gambling houses interested in this arrangement.

Later, that same evening, the investigators went to 58 East Broadway and were admitted to the Tai Look basement gambling house by Wong Wah, the English-speaking secretary to the Tai Look Association. Wah permitted the investigators to search for illegal aliens and then told them that Ong had called him. (Tr. 71).\*

Two days later, the investigators met Ong at 15 Pell Street. Ong told the investigators that he had spoken with the Mott Street gambling house bosses and that they felt that \$200 for each house per week was too much, but they were willing to pay \$100 each. Ong said that

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\* INS investigators must have permission to enter the premises of these associations unless armed with a search warrant. (Tr. 133).

his house and the Catherine Street and 58 East Broadway gambling houses would pay \$600 a week beginning on November 15th. (Tr. 72-73). During this conversation, the investigators expressed anger that Wah had mentioned to Investigator Kibble that Ong had called him. Ong agreed that Wah had been foolish and said that he would straighten Wah out. (Tr. 74).

### **C. Ong's and Wong Wah's payoffs begin.**

On November 14 and 15, 1973 the investigators called Ong. These conversations were recorded. On the latter date Ong agreed to meet the investigators in Columbus Park. (Tr. 78; GX 2). At about 2:00 P.M., Granelli and Kibble met Ong and Wah at the appointed place. During the conversations that followed, all of which were recorded, Ong shook Granelli's hand and handed him \$400 saying, "\$400 for me and Wong [Wah], for my place and his place." (Tr. 79-81; GX 3).

Six days later, on November 21, 1973, the investigators once again met Ong, who was this time alone. Ong handed Granelli \$400 telling him it was for gambling houses. Ong advised the agents to raid Catherine Street because the gambling bosses there had not as yet turned over any money and were reluctant to go along with the scheme. (Tr. 90-92).

One week later, the investigators met with Ong and Wah near Columbus Park. At this meeting, which was surveilled by agents of the FBI and recorded, Ong handed Granelli \$400 again saying it was for Ong and Wah. Ong then discussed paying off police and mentioned that he knew Police Commissioner Murphy and bought him "an airline ticket to go on vacation." (Tr. 95-96; GXs 4, 5).

That same evening Granelli called Ong to warn him that INS was going to hit his and Wah's houses. (GX 6). Not surprisingly, when Granelli, Kibble and several other investigators arrived at Ong's gambling hall to look for illegal aliens, there were none to be found. All was also in order at Wah's establishment, the Tai Look Association. (Tr. 98, 100).

On December 3, 1973, Ong again expressed displeasure that the Catherine Street gambling bosses were not paying off. He singled out for mention defendant Albert Young, a Catherine Street boss, who he said had once missed a \$5000 payment to a police inspector from the 1st Division which Ong had eventually been forced to pay. (Tr. 101-06).

Ong and Wah thereafter made \$400 payments on both December 5 and 12, 1973. On the latter date, Ong again inquired whether the Catherine Street houses had begun to pay, and the investigators informed him that they had not. (Tr. 119-22; GXs 8, 9).

#### **D. Albert Young's approach to the investigators.**

On the evening of December 12, 1973, Granelli and Kibble, looking for illegal aliens, passed in front of One Catherine Street, where Albert Young the English-speaking secretary of the Tsung Tsin Association motioned to them. (Tr. 135). After a brief discussion, the investigators agreed to meet with Young the next day. (Tr. 137).

On December 13, 1973, as scheduled, the investigators met with Young. During that meeting, Young passed Investigator Kibble \$200 under the table, stating "here, take two, this is two." (Tr. 138). Young said that he wanted the same arrangement as Ong and that

he wanted the investigators to stay away from his gambling house. (Tr. 139). Young told the investigators not to tell Ong about their deal, because he was not anxious to have Ong know about his business. (GX 10).

Six days later the investigators met with Ong and Wah near Columbus Park. Ong handed the investigators \$400 for himself and Wah, and then told the investigators that he had heard Catherine Street was paying and he wanted to know how much. The investigators told Ong that Young was paying \$200 a week. Ong and Wah then encouraged the investigators to increase the amount of Young's payments. (Tr. 141-42). Finally, Ong suggested that they not let Young fall behind in his payments, reminding them of Young's default on a \$5000 payment to the police. (Tr. 144; GX 11).

During the next four weeks Ong, Wah and Young continued to make their illegal weekly payments to the investigators. (Tr. 146-49, 152, 162-65; GXs 12-15).

**E. Tom Kom, with Ong's assistance, agrees to bribe the investigators.**

On January 17, 1974, the investigators spoke with Ong and told him that a man had come out of 61 Mott Street and had spoken with two other INS investigators about straightening out what was going on at Mott Street. The man offered to take the investigators down to see Ong correct matters and asked the agents, "how much can I give you?" (Tr. 167-68). Ong said he knew who the man was and agreed that the man had acted stupidly. Ong then said that he would speak to the man, and asked the investigators "what if he wants the same thing as me, what if he wants the same deal." The investigators told Ong that they would speak to their boss about the matter. (Tr. 168-69).

After leaving Ong, the investigators went to a bar. Shortly after they entered, Ong arrived with Tom Hom. Hom, who had been the person who had spoken to the other investigators, told Granelli and Kibble that he had just opened his own gambling house and did not want INS around. Ong told the investigators that Hom wanted the same deal as he had, namely, \$200 a week. (Tr. 169-70).

On January 23, 1974 the investigators, following a telephone call, met with Ong, Hom and Wah at the same bar. The three men arrived separately. Ong, who arrived first, paid \$200. As Ong was leaving, Hom came in, sat down and also paid \$200. After Hom left, Wah came in and paid \$200. (Tr. 172-73; GX 16).

The defendants' payments continued to follow a regular pattern after January 23, 1974, except for Wah who on February 13, 1974 stopped making payments for one week when he temporarily went out of the gambling business, and Young who went out of business temporarily after May 8, 1974. (Tr. 184-237). Following arrests by persons associated with Maurice Nadjari in late March 1974, Wah and Hom became fearful of dealing directly with INS investigators Granelli and Kibble. Thereafter during June and July 1974, it was Ong alone who tendered the payments on behalf of himself, Wah and Hom. (Tr. 216-36). The conversations with the defendants as they paid bribes were regularly recorded. (GX 17-35, 37-39, 41-52).\*

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\* When making his February 27, 1974 payment, Ong mentioned that there was a new mahjong parlor on East Broadway that had a lot of illegal aliens. Ong suggested to the investigators that they arrest some of these aliens, but instead of taking them to the INS office, he suggested holding them so that he could come back and tell them that if they paid \$300 to the agents they would be released. (Tr. 196).

[Footnote continued on following page]

On July 14, 1974 the investigation having been brought to a logical conclusion (Tr. 745), the FBI and the INS executed arrest and search warrants for the defendants. (Tr. 238).

## ARGUMENT

### POINT I

**The jury properly found a single conspiracy pursuant to wholly correct instructions.**

Hom attacks here for the first time the District Court's charge on the issue of multiple conspiracies, contending that it was inadequate and failed specifically to instruct the jury that to convict of conspiracy it must find that the defendant under review was a member of the conspiracy charged and not some other conspiracy.\*

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On March 6, 1974 Ong told the investigators that several policemen had been arrested recently in Brooklyn and that after they were arrested, they had admitted that Ong had given them money. (Tr. 198). When asked by Granelli why Ong had taken the chance of approaching Granelli and Kibble, Ong said, "I could just look at someone's face and I can tell if they are straight or not." (Tr. 199; GX 23).

On April 7, 1974 the investigators met with Ong. Ong stated that he had been arrested by police from Nadjari's office. When Granelli said to Ong "I thought you said you take care of Headquarters," Ong replied, "I do, but these are special, these are from Nadjari." (Tr. 211-12).

\* Prior to closing arguments, the trial court advised counsel that it would instruct the jury on the issue of multiple conspiracies in accordance with the language approved by this Court in *United States v. Tramunti*, 513 F.2d 1087 (2d Cir.), cert. denied, 423 U.S. 832 (1975) (Tr. 903). No counsel raised any objection to the proposed charge (Tr. 920). The court then correctly charged the jury in the language quoted in the text

[Footnote continued on following page]

The argument is utterly frivolous and simply ignores the record below.

The trial court's charge on multiple conspiracies was as follows:

Now, in considering the first element of whether a conspiracy existed, a further matter which the Government must prove to your satisfaction beyond a reasonable doubt, if any defendant is to be convicted on Count 1, is that a single overall conspiracy of the nature charged in the indictment exists. I use the words "single overall" in contrast to the concept of several, separate and independent conspiracies involving various groups of conspirators.

It is the Government's theory that Benny Ong, Wong Wah and Tom Hom conspired together in a single scheme to bribe the investigators of the Immigration and Naturalization Service.

In determining whether there was a single overall conspiracy, you may consider what the evidence shows as to changes of personnel and

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hereinafter. The sole exception taken to that part of the court's charge, raised by counsel for defendant Hom, was that the court had failed to instruct the jury that if they found the existence of two conspiracies, mere knowledge on the part of a defendant in one such conspiracy of the existence of the other did not constitute proof of the single overall conspiracy charged (Tr. 1175-1176). The court declined to amplify or amend what it had said, correctly noting that the charge as given substantially complied with the then request (*ibid.*).

Since defendants failed below to raise their current assignment of error, they are precluded from seeking review in this Court of that aspect of the charge. *United States v. Ingenito*, Dkt. No. 75-1312 (2d Cir. March 16, 1976), slip op. 2685, 2689-2690; *United States v. Goldberg*, 527 F.2d 165, 173 (2d Cir. 1975).

activity. You may find a single conspiracy even though there were changes in personnel and activities provided that you find that some of the conspirators continued throughout the life of the conspiracy and that the purpose of the conspiracy continued to be that charged in the indictment.

The fact that the parties are not always identical does not mean that there are separate conspiracies. In other words, if at all times the alleged conspiracy had the same overall purpose and the same nucleus of participants, the conspiracy would be the same basic scheme even though in the course of its operation additional conspirators joined in and performed additional functions to carry out the scheme.

In essence, the question is: What is the nature of the agreement? That is for you to determine after examining all the evidence. And when I say "the agreement," I suppose I should add the agreement, if any, and I want to assure you that any statement I make to you is not to suggest or indicate any factual inference on your part.

Now, the defendants Benny Ong, Wong Wah and Tom Hom contend that the Government has failed to prove the existence of the single conspiracy alleged, and that, at best, the evidence shows the existence of two separate and independent conspiracies involving two persons in each conspiracy.

Proof of two separate and independent conspiracies is not proof of the single overall conspiracy charged in the indictment. Thus, if you were to find based on the evidence in this case that defendant A conspired with defendant B and

also that defendant A conspired with defendant C and that both conspiracies had the same unlawful objective, the Government would have failed to prove the existence of a single overall conspiracy and you must find the defendants not guilty of the conspiracy charge in Count 1. (Tr. 1140-1142).

The charge as given was not only fully consistent with the settled law of this Circuit, *United States v. Cohen*, 518 F.2d 727, 735 (2d Cir.), *cert. denied sub nom. Duboff v. United States*, 423 U.S. 926 (1975); *United States v. Tramunti*, *supra*, 513 F.2d at 1107-1108; *United States v. Bynum*, 485 F.2d 490, 497 (2d Cir. 1973), *vacated and remanded on other grounds*, 417 U.S. 903 (1974), but it was far more thorough than other more recently approved formulations, *compare United States v. Bernstein*, Dkt. No. 74-2328 (2d Cir. March 4, 1976), slip op. 6631, 6662 & n.12. Moreover, the last two paragraphs of the above quoted portion of Judge Briant's charge thoroughly refute Hom's current contentions.

Finally, to the extent that Hom is presently claiming that the evidence of a single conspiracy was insufficient to warrant submission of the conspiracy charge to the jury, the claim is equally frivolous. The record clearly indicates that Hom was introduced to INS agents Granelli and Kibble by Ong and that Ong said to the agents in Hom's presence that Hom wanted to become a part of the payoff arrangement on the same terms as Ong. Thereafter on five occasions Hom and Ong jointly met the investigators to make other payments; and on two other occasions Ong, Wah and Hom appeared separately at the same restaurant within minutes of one another to make payments of the bribe money. On at least one of these occasions Ong called the co-defendants by telephone and thereafter advised the INS investigators that Wah

and Hom would arrive shortly. Lastly, following the Nadjari arrests in late March 1974, Ong on numerous subsequent occasions made payoffs to the INS investigators not only for his own gambling house but for the houses of Wah and Hom as well.

## POINT II

**Dismissal of the conspiracy count as to Albert Young did not require severance of the remaining substantive charges against him.**

Young contends that the District Court erred when, after dismissing the conspiracy count as to him, it refused to grant him a separate trial by severing the remaining substantive counts in which he was named. However, Judge Briant's decision to submit the substantive charges against Young to the jury was entirely proper. Since the indictment properly joined Young and his co-defendants, see Fed. R. Crim. P. 8(b), his conviction on the substantive counts must stand unless it appears that the joinder prejudiced him or was effected in bad faith. See, e.g., *Schaffer v. United States*, 362 U.S. 511 (1960), *affirming United States v. Schaffer*, 266 F.2d 435 (2d Cir. 1959); *Stern v. United States*, 409 F.2d 819, 820 (2d Cir. 1969); *United States v. Catino*, 403 F.2d 491, 494-496 (2d Cir. 1968), *cert. denied sub nom. Pagano v. United States*, 394 U.S. 1003 (1969); *United States v. Brandom*, 431 F.2d 1391, 1396-1397 (7th Cir. 1970), *cert. denied sub nom. Gilboy v. United States*, 400 U.S. 1022 (1971). See also *United States v. Miley*, 513 F.2d 1191, 1209-1210 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975).

Young contends that the conspiracy charge against him was included in bad faith because it was alleged without "reasonable expectation that sufficient proof

would be forthcoming at trial." *United States v. Aiken*, 373 F.2d 294, 299 (2d Cir. 1967). The trial court found, however, "that the government joined these defendants and resisted the motions for severance in perfect good faith"; and that it "had reasonable grounds to believe that it could prove Mr. Young's participation in the conspiracy." (Sentencing minutes of Jan. 13, 1976, p. 16). Given the evidence linking Young with his co-defendants in the bribery scheme, that finding was plainly correct, and in no event "clearly erroneous".

The record is clear that during the initial meetings with INS agents Granelli and Kibble during which the bribery scheme was discussed, Ong specifically stated that he was speaking on behalf of his own gambling house at 9 Pell Street, the defendant Wah's house at 58 East Broadway and the defendant Young's house at 1 Catherine Street, and would pay the agents \$600 per week (\$200 each) for the three houses. Thereafter, on November 15, 1973, the defendants Ong and Wah began making \$200 weekly payments to Granelli and Kibble and further indicated that while Albert Young's Catherine Street club still wanted to join in the bribery scheme, Young did not want to deal with the agents through Ong. In this and a subsequent conversation, Ong advised the agents to speak directly with Young, and that if necessary he (Ong) would effect an introduction between Young and the agents. In a December 3, 1973 taped conversation, Ong indicated that Wah and Young were partners in the Catherine Street gambling house, and that since they (Wah and Young) did not get along well, Wah had asked Ong to talk to Young about joining the bribery plan. Ong said he was not inclined to help Young because Young had previously been delinquent in repaying him \$5,000 that Ong had advanced on Young's behalf to pay off the police. Shortly thereafter, on December 12, 1973, defendant Young himself approached the investigators and asked to be cut in on

the bribery scheme. Young said he was "losing face" because INS continued to arrest aliens in his gambling club. Young then stated that he had learned from Ong of his payoff agreement with the agents and that he (Young) wanted the same deal. Young said that he would pay Granelli and Kibble the same amount they received from Ong (although he did not want Ong to know about it) in return for their not searching his club for illegal aliens. On the following day, December 13, 1973, Young again met with the investigators and made the first of many \$200 weekly (or \$400 biweekly) payments he would make over the next eight months. Immediately thereafter, on December 19, 1973, Ong and Wah advised Granelli and Kibble that they (Ong and Wah) were aware that Young was now "doing business" with the agents and even knew that Young was over-charging the gambling house on the transaction. In the ensuing months, Ong, Wah and Young, as well as the defendant Hom, continued to make regular bribe payments in the very same amounts, to the very same agents, often on the very same day, and for precisely the same purpose. Later on, Ong would even advise the agents when Young's house was open or closed so they would know whether or not to expect a payment from Young.

Even assuming the correctness of the District Court's dismissal of the conspiracy charge in the face of the foregoing evidence, a failure of proof at trial does not in itself establish bad-faith joinder.\* Indeed, this Court

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\* In dismissing the conspiracy charge against Young, the District Court found that there was insufficient non-hearsay evidence of Young's membership in the conspiracy to permit the use against Young of Ong's hearsay statements evidencing Young's membership in the conspiracy, see *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied sub nom. Lynch v. United States*, 397 U.S. 1028 (1970), and that in the absence of the hearsay evidence there was insufficient proof to allow the charge to go to the jury (Tr. 874-876).

refused to find bad faith in *Schaffer, supra*, although there was "nothing in the record to indicate that any [defendant] knew of Stracuzza's dealings with the others." 266 F.2d at 441. (Stracuzza in *Schaffer* was the hub of what the Government contended to have been a "spcke" conspiracy.)

Furthermore, the record contains little or no support for Young's claims of serious prejudice to him by virtue of the joinder. The trial was relatively short and the issues for the jury were relatively simple. The summation of Young's counsel clearly focused the jury's attention on the distinct factual issue with respect to Young. As Judge Briant correctly observed after dismissing the conspiracy charge against Young, the sole issue for the jury to determine was "whether on those dates and times [charged, Young] knowingly and wilfully gave these public officials money in the amounts stated for the purposes of influencing their official acts. That's all. That is very simple." (Tr. 880).

Moreover, Judge Briant's charge, to which no error is assigned by Young, carefully enjoined the jury that in determining the guilt or innocence of Young it could not consider "any evidence, any conversations or activities which did not take place in Young's presence or to which he was not a party." (Tr. 1119, 1127). Young asserts that notwithstanding these concededly correct instructions the pervasive evidence of Ong's corruption must necessarily have "spilled over" and prejudiced the jury's deliberation of his guilt or innocence. The claim is nothing more than rank speculation which ignores the powerful and unanswered case against Young amassed by the prosecution—including tape recordings of six of the payoffs of which Young was convicted.

Finally, any claim by Young of impermissible prejudice to him by virtue of the joinder is rendered baseless

by the District Court's clearly correct\* finding that even at a separate trial of Young the Government could properly prove the existence and specific nature of the conspiracy between Ong and the other co-defendants. That is so, the District Court correctly reasoned, because the evidence established that Young had full knowledge of all the means and purposes of the charged conspiracy and intended to, and indeed did, secure for his gambling house, by specific reference to Ong's scheme, an identical arrangement with INS agents Granelli and Kibble. (Tr. 879).

In these circumstances, Judge Brieant's refusal to sever cannot accurately be said to be an abuse of discretion.

### POINT III

**The District Court properly permitted the Government to adduce evidence of Ong's other corrupt acts of bribery and of his arrest by agents of Special Prosecutor Nadjari. The bulk of the evidence regarding narcotics was redacted and never received by the jury and the limited references which survived incriminated neither Ong nor any of the other defendants.**

Ong, Wah and Young contend that reversal is required because the prosecution deliberately introduced irrelevant and highly inflammatory evidence of uncharged criminal conduct on the part of Ong—involving other acts of bribery, narcotics and guns—solely to prejudice the jury against Ong and, by “spillover,” his co-defendants. The contentions are devoid of merit. Ong's statements to the INS investigators of his corrupt bribery practices in behalf of one or more Chinatown gambling houses were in furtherance of the conspiracy charged, and tended to

negate the defense of coercion raised by all defendants. The evidence of the Nadjari arrests was similarly admissible to explain how, thereafter, the alleged conspiracy operated; and the incidental evidence of references by Ong to narcotics and gun activities on the part of individuals other than the defendants herein incriminated neither Ong nor any other defendant.

It is settled that evidence of other crimes is admissible if introduced for any purpose other than to show the defendant has a bad character or is a bad person. *E.g.*, *United States v. Santiago*, 529 F.2d 1130, 1134-1135 (2d Cir. 1976); *United States v. Leonard*, 524 F.2d 1076 (2d Cir. 1975), *cert. denied*, —U.S.—, 44 U.S.L.W. 3624 (May 3, 1976); *United States v. Gerry*, 515 F.2d 130 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States v. Eliano*, 522 F.2d 201 (2d Cir. 1975); *United States v. Papadakis*, 510 F.2d 287 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States v. McCarthy*, 473 F.2d 300 (2d Cir. 1972); *United States v. Fried*, 464 F.2d 983 (2d Cir.), *cert. denied*, 407 U.S. 911 (1972); *United States v. Deaton*, 381 F.2d 114 (2d Cir. 1967); Rule 404 (b), Federal Rules of Evidence. In ruling on the admissibility of this evidence, the District Court must weigh the probative value of the evidence against its potentially prejudicial effect. This question is addressed to the sound discretion of the trial court, whose determination is entitled to great weight. *United States v. Leonard*, *supra*, 524 F.2d at 1080; *United States v. Brettholz*, 485 F.2d 483, 487-488 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974).

In the instant case, the Government did not seek to adduce in an otherwise weak and insufficient case extrinsic evidence of other misconduct. Rather defendants' guilt here can fairly be said to have been established by overwhelming proof, and the evidence of Ong's uncharged misconduct came, almost exclusively and usually unsolicitedly, out of his own mouth during many of the very conversations in which he paid on behalf of himself, and

sometimes other of the defendants, the very bribes charged in this case.

### **A. Other bribes**

During his relationship with INS investigators Granelli and Kibble, Ong sometimes recited instances from his long and successful experience in bribing other police authorities to permit Chinatown gambling houses to operate without interference from those authorities. The evidence of those other bribes adduced through Granelli's testimony and the pertinent tapes and transcripts, established that Ong had made payoffs to members of the Fifth Precinct, which covers Chinatown (Tr. 229), to other police officers generally (Tr. 209-210), to police officers who were later arrested in Brooklyn (Tr. 198-199), and to a police inspector on behalf of Young and himself (Tr. 105-106). Additionally, there was evidence that Ong had said that in an effort to secure greater protection for his Chinatown gambling activities he had given gratuities of one sort or another to former Police Commissioner Murphy and to former Chief of Detectives Seidman (Tr. 95-96, 209-210).

Contrary to appellants' current contentions that the foregoing evidence was irrelevant and impermissibly prejudicial, Ong's statements of other long-running and successful bribery activities involving high-placed police officials were in furtherance of the conspiracy charged. The statements were, in large measure, designed to assure Granelli and Kibble that the latter could undertake and continue to accept bribes from Ong and other similarly situated operators of Chinatown gambling houses without fear of detection and arrest (see, e.g., Tr. 200-210). Furthermore, Ong's statements of past and contemporaneous bribery schemes to protect the Manhattan gambling houses, some of which were made in Wah's pres-

ence, served to undermine the defense of economic coercion adopted by the defendants from the outset. The evidence made clear that at least so far as Ong, the principal conspirator, was concerned, the instant conspiracy was simply a part of a much broader pattern of corrupt bribery practices aimed at protecting the Manhattan gambling houses against enforcement of the laws which would interdict their activities.

The foregoing facts may serve to explain why, with one principal exception, the bulk of the proof of other bribery misconduct referred to above was received below without objection (*e.g.*, Tr. 95-96, 198-199, 209-210). For this latter reason alone, and apart from their lack of merit, this Court may properly decline to entertain appellants' current assignments of error. *United States v. Indiriglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), cert. denied, 383 U.S. 907 (1966). Indeed, far from protesting the admissibility of the now challenged evidence, counsel for Ong in his opening to the jury previewed much of the same—apparently assuming it was admissible—and argued that while Ong had made the challenged statements, they constituted merely “puffing” (Tr. 43-44).

Young, however, did object to and now complains about the evidence that on December 3, 1973 Ong said that Young had once owed him \$5,000, and that the debt resulted from the fact that some time earlier Young had failed to make a required \$5,000 bribe payment to a police inspector and, that at Young's request, Ong had made the payment instead.\* Ong said Young later paid

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\* Not surprisingly, only Young presses this claim on appeal. The admissibility of the statements as to Ong, who uttered them, is unchallenged; and the trial court specifically instructed the jury that they could not consider the evidence in question against Wah and Hom (Tr. 105).

him back (Tr. 106). This evidence, however, even standing alone, was properly admissible to explain the degree of animus between Ong and Young and to explain why Young always made his bribe payments directly to Granelli and Kibble and why, in contrast to the other co-defendants, Ong never served as a conduit for any of Young's payments.\*

More importantly, perhaps, is the fact that in their tape recorded December 27, 1973 conversation with him, INS investigators Granelli and Kibble confronted Young with Ong statements regarding this prior bribery incident and asked if they were true (Tr. 149; GX 14). Young's response was to say, in substance, that, "I don't like Benny talking about something like that." (Tr. 149). Later in the same conversation he said regarding the same subject "I don't like people who talk with big mouth like that." (Tr. 149-150). The jury could permissibly have inferred from the foregoing a tacit admission on Young's part that what Ong had said regarding the \$5,000 bribe payment was true. Accordingly, all of the evidence of that incident was admissible to rebut Young's defense of coercion and lack of criminal intent with respect to the instant charges.\*\*

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\* Of course, prior to the dismissal of the conspiracy count as to Young, the evidence of the prior concerted conduct of Young and Ong was probative of Young's intent to conspire with Ong and the others as charged in Count One.

\*\* Young claims (Brief at 31) that in summation the prosecutor violated the court's limiting instruction that the testimony of Ong's statements regarding the \$5,000 bribe payment had not been admitted as to Young for the truth of the matter stated. The contention is in error. The evidence was admissible against Ong and the prosecutor's remarks in large measure simply reflected that earlier ruling (Tr. 955-956). Moreover, at the time of the challenged argument the court gave a further limiting instruction, which in pertinent part provided:

[Footnote continued on following page]

Appellants' other claims of error in this area may be disposed of summarily. No conceivable prejudice accrued to Ong, much less any other defendant, by reason of the trial court's momentary and unexplained reference to transactions or conversations "between Ong and Mackell." Rather than a "gratuitous reference", as Ong now claims (Ong Brief at 25 n.), the court's remarks were made in clarifying its side bar ruling to exclude proof that Ong had bribed members of the Queens District Attorney's Office to fix narcotics cases (Tr. 186-190). The absence of any conceivable prejudice is evidenced by the lack of any objection below to the court's remark.

Finally, the evidence that Ong encouraged Granelli and Kibble to raid one of the gambling houses not making payoffs, arrest the illegal aliens who patronized the same and then accept bribes from the latter, was probative of Ong's knowledge and intent to commit the crimes charged and served to rebut his defense of coercion. Moreover, the District Court properly instructed the jury without objection that such evidence could be considered by them only as it bore on the pertinent defendant's motive or intent (Tr. 1165).

## **B. Narcotics**

Ong, Wah and Young contend that the trial court committed reversible error in admitting into evidence

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The jury may not consider whether or not any money was laid out for Albert Young in determining the case concerning Mr. Ong or Mr. Young. They may, however, consider with respect to Mr. Ong the fact of his having made the statement if the jury finds that he in fact did make the statement. But as to Mr. Young, the statement is hearsay (Tr. 955).

That instruction, we respectfully submit, not only cured any conceivable error but, in light of Young's own tacit admissions regarding the earlier bribe, gave to Young more than he was entitled.

statements made by Ong on January 23 and February 6, 1974, respectively, in which he evidenced knowing that two residents of Chinatown other than defendants herein, Frank Wong and Lee Louie, possessed or dealt in heroin. The contentions are devoid of merit. The evidence in issue consisted of limited portions of two tapes and pertinent transcripts of otherwise clearly admissible conversations between Ong and the INS investigators on the two above-mentioned dates. The brief and, for the most part, veiled references to the heroin activities of these two others in no way incriminated Ong, much less any of his co-defendants. Moreover, defendants' belated trial objections contributed to whatever arguable prejudice the challenged evidence occasioned.

Contrary to Young's current assertions (Brief at 33), the trial court did not summarily deny the motion of defendant Wah's counsel to strike from evidence those portions of the transcripts which referred to drugs. In truth, the Government provided counsel for all defendants with copies of all tapes and with tentative drafts of the related transcripts several months before trial, and with final versions of the transcripts approximately two weeks before trial. Both the trial court and Government counsel several times during the months preceding trial requested that defense counsel raise such objections or move for such relief as was suggested to them by a review of the tapes and transcripts. No such motions were filed, nor was any other such relief sought before trial. Instead, during the midst of Grannelli's direct examination, defense counsel for the first time sought to exclude evidence of Ong's references to narcotics as well as to certain other subjects plainly set forth in the transcripts. While in light of the Government's pretrial disclosures, the court could properly have refused to entertain defendant's objections, *United States v. Chiarizio*, 525 F.2d 289, 290-294 (2d Cir. 1975), it

directed the prosecution to redact those specific passages of the tapes and transcripts, including those referring to drugs, to which defense counsel had objected (Tr. 156-161).

Subsequently, when the court and counsel undertook specifically to redact the various passages earlier objected to, defense counsel further moved to exclude the portions of the January 23 and February 6 conversations in issue here (Tr. 257-275). The court declined to do so, finding that the challenged remarks did not incriminate Ong or any other defendant and that, at most, they evidenced only Ong's awareness of certain "local news" (Tr. 264).

Accordingly, the court submitted both conversations in full to the jury, but admonished them repeatedly that evidence of "dealing in narcotics by persons other than these defendants" was to be disregarded (Tr. 202-203, 262, 270, 1017-1018, 1165). Ong thus received perhaps a more favorable instruction on that subject than that to which he was entitled since as the trial court correctly noted (Tr. 264-266), the evidence of his willingness to discuss the subject of drugs with the investigators was certainly probative of the character of his relationship with them and tended to negate his defense at trial that the investigators had coerced him into making payoffs.

Ong's assertion (Ong Brief at 17-18) that in admitting the challenged remarks the trial court misapplied the doctrine of "completeness" is simply in error. "To [have] exclude[d] those statements [concerning drugs] which were not considered to be in furtherance of the conspiracy would have resulted in a disjointed conversation which might have confused the jury." *United States v. Grant*, 462 F.2d 28, 33-34 (2d Cir. 1972). Accordingly, since Ong's conversations of January 23 and February 6 were themselves in furtherance of the conspiracy, the entire conversation was admissible under the doctrine of completeness. *Id.* at 34.

In any event, the reference to the challenged remarks makes clear not only that Ong himself did not possess or deal in drugs and that he rejected any involvement for himself, but, also, that he instructed defendant Wah not to become so involved, advising that it would only "invite trouble" (GX 20, p. 9). Moreover, the challenged evidence is limited to the passages from the two conversations in issue. The Government elicited no oral testimony regarding the subject of drugs, nor did the prosecutor seek to make any use, either in opening or in summation, of the challenged evidence.

Ong's palpably false assertion that the Government sought to portray him as a former narcotics trafficker\* and as an associate in Hip Sing of a major narcotics trafficker, Frank Wong (Ong Brief at 16-17), only serves to demonstrate the fundamentally fallacious nature of defendants' claims of prejudice.

Contrary to Ong's claim, the prosecutor never once elicited evidence or argued to the jury that Ong had some past or present drug involvement or that Hip Sing was a powerful criminal organization (Ong Brief at 16-17), rich from narcotics activities as well as gambling. In truth, Hip Sing was consistently referred to as a major Chinese fraternal and social association (Tr. 23, 324-325). Ong's current allegation of a prosecution effort to link the limited evidence of Frank Wong's association with drugs and his membership in Hip Sing to Ong, also a member of Hip Sing, is utterly false and unsupported by anything in the record. Indeed, the effort by Ong's counsel on appeal to forge such a link by recasting the trial

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\* The entire predicate for this assertion is the following exchange between Granelli and Ong during the January 23, 1974 conversation (GX 42, p. 4):

- G. What's it, #4? Is it white or was it brown rock?  
 O. White. That's what they said—I don't know. To me—to me—don't know nothin' on those things.  
 (Laughs)  
 Yeah—that's true—don't do that no more.

record provides ample evidence of the meritless character of this claim.\*

Finally, in light of the fact that the brief mention of drugs cannot accurately be said to have incriminated even Ong, the claims of Wah and Young that somehow that evidence, standing alone, might have led the jury to brand them as narcotics traffickers are utterly devoid of merit.

### C. The Nadjari arrests

Ong, Wah and Young contend that the trial court committed reversible error in admitting irrelevant and impermissible prejudicial evidence of the fact that Ong had been arrested on March 9, 1974 by police attached to the office of Special Prosecutor Nadjari. The contentions are meritless and simply ignore substantial portions of the record.

The evidence complained of consisted of Granelli's testimony that on April 7, 1974, Ong told Kibble and him (1) that he had been arrested by Nadjari's police (Tr. 211-212); and (2) that the police were looking for Wong Wah but the latter had run away (Tr. 212).\*\* Ong also told them on that date, "don't do what those other guys did to me" (Tr. 213).\*\*\* Granelli further testified

\* Likewise, Ong's claim that the prosecution withheld material relating to Wong's activity which somehow was required to be disclosed under *Brady* is frivolous. We invite the Court's attention to the material in issue which was tendered to the District Court and placed under seal, and to the propriety of the District Court's decision declining to make disclosure (Tr. 314-318).

\*\* Pursuant to Wah's motion, the trial court struck Granelli's hearsay testimony of Ong's statement about Wah's flight and instructed the jury to disregard it (Tr. 212).

\*\*\* In response to Ong's news of his arrest by Nadjari, Granelli said, "I thought you said you take care of headquarters." Ong replied, "I do, but these are special, these are from Nadjari" (Tr. 212).

that on April 25, 1974, in addition to making a \$400 payoff, Young told him and Kibble that he believed they were being followed by Nadjari's police; in consequence, he expressed a desire to make the payoffs once every two weeks, rather than weekly (Tr. 218).

We note at the outset that Young's claim of error regarding this evidence is particularly hollow. The trial court specifically instructed the jury at the time the evidence was received that Young had never been arrested by any agents of Special Prosecutor Nadjari, and that even if he had it would have nothing to do with the guilt or innocence of any defendant on trial (Tr. 215).

More importantly, perhaps, despite appellants' protestations to the contrary, the evidence of Ong's and Young's statements referring to the arrests by and related activities of Nadjari police agents was highly pertinent to the issues at trial. Indeed, Ong's statements may properly be said to have been in furtherance of the conspiracy charged—since they urged Granelli and Kibble not to inform on him as did the Nadjari agents but, rather, to continue to ply their apparently corrupt ways. Moreover, these statements of Ong and Young were highly pertinent to and tended to negate the defense of coercion raised by both those as well as the other defendants.

Furthermore, the evidence of the Nadjari arrests and the resulting tremor in the Chinatown gambling house community served to explain to the jury why, for a while, certain of the gambling houses associated with the defendants closed and the latter ceased making payments to Granelli and Kibble, and why after March 29, 1974—the date of the arrests—two of the defendants, Wah and Hing, became distrustful of the investigators (Tr. 217).

and began making their payoffs to them through Ong, rather than on a face-to-face basis as previously.\*

Finally, the fact of the Nadjari arrests and the resulting concern generated in federal authorities that the publicity given to undercover corruption efforts focused on the Chinatown gambling community might make defendants herein more suspicious of Granelli and Kibble and make the latter's wearing of body recorders more dangerous, served to explain to the jury why after March 29, 1974 the investigators ceased wearing recording equipment and why, as a consequence, the conversations during that period were in fact not recorded (Tr. 433).

#### **D. The "gun problem"**

Ong asserts that reversal is required because investigator Granelli twice said in passing during his testimony that during the course of his December 3, 1973 meeting with Ong, the latter had said "that he [Ong] had straightened out the gun problem" (Tr. 101; 440-441). The assertion is utterly frivolous and constitutes a grossly misleading characterization of the import of the evidence in question.

While Ong quotes liberally from the trial testimony of Granelli to make his purported point (Ong Brief at 23-24), he utterly and conveniently ignores the best evidence of the December 3, 1973 conversation between Ong and Granelli—the tape recording and related transcript

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\* Indeed, following the Nadjari arrests, neither Hom nor Wah made any direct payments to Granelli and Kibble, choosing instead to deal from a distance through Ong. Thus, although the District Court struck Granelli's testimony of Ong's statement relating to Wah's flight, it would have been perfectly proper, we respectfully submit, to admit that evidence of Ong's statement as a declaration in furtherance of the charged conspiracy, serving to explain why Wah's payments thereafter were tendered by Ong and not Wah.

(GX 7). That recording and transcript made crystal clear to the jury that the gun problem referred to on December 3 by Ong and the investigators consisted of unidentified individuals other than Ong roaming the streets of Chinatown armed with guns. Apparently Ong straightened out the gun problem by using his influence to secure police patrols of those streets (GX 6, pp. 4-5 (3-15)).

Never once did Ong intimate, much less state, that he himself ever used or carried a gun. The evidence of the December 3 discussion of the gun problem, most of which Ong chooses to ignore, not only does not incriminate Ong but serves, instead, to cast him in a favorable light as an elderly and concerned inhabitant of the Chinatown community who was himself once threatened with a gun (GX 7, p. 4).

The utter frivolousness of Ong's current claim of error is reflected in the fact that at trial he never once sought to have the court redact or exclude any portion of the recording or transcript of the December 3, 1973 conversation and the now challenged references to the gun problem in Chinatown.\* Given the foregoing facts, Ong's current claim that Granelli's two passing testimonial references to Ong's December 3 mention of the "gun problem" constitutes part of the apparent effort by the Government to suggest that [Ong's] entire career has been reprehensible" (Ong Brief at 24-25) (footnote omitted) is a thoroughly false accusation unsupported by a scintilla of evidence.

Finally, in any event, the District Court clearly enjoined the jury from giving any consideration whatsoever to the incidental evidence relating to the problem of guns (Tr. 102).

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\*The passing suggestion in Ong's Brief, page 23 n., that the evidence of the December 3 conversation was irrelevant is likewise frivolous, as an examination of the pertinent transcript makes clear (GX 7). Moreover, Ong never objected to the relevance of that evidence below.

**POINT IV**

**There was no improper curtailment of Wah's cross-examination of Investigator Granelli, nor was Wah deprived of his right to confront the witness.**

Wah argues that the trial judge improperly deprived him of the right to cross-examine Investigator Granelli when, during defense counsel's questioning of Granelli, the Court ordered counsel to be seated. This claim lacks merit. Under the circumstances, Judge Brieant—confronted with blatant disregard of his evidentiary rulings—acted well within his discretion in ordering counsel to be seated, and counsel's failure to question Investigator Granelli when given an opportunity to do so on re-cross examination plainly demonstrated that Wah suffered no prejudice.

Early on in the trial the Court ruled that many of Ong's conversations concerning other brushes with the law and narcotics transactions, in particular, were to be excluded. As a result, the Government's tapes and transcripts were redacted and, but for two minor references to narcotics (neither of which directly implicated the defendants in any unlawful activity), all references to narcotics were kept from the jury.

During Wah's counsel's cross-examination of Investigator Granelli, the Court's prior ruling with respect to the introduction of narcotics-related discussions were blatantly disregarded. Mr. Herman first asked, "You sought in one of these conversations, at the very least to suck Johnny Wong into a narcotics deal, didn't you?" (Tr. 542).<sup>\*</sup> The Court sustained the Government's ob-

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<sup>\*</sup> Wah's brief which purports to quote directly and completely from the record omits entirely this question and the response

[Footnote continued on following page]

jection to this question. Undaunted, the next question propounded by Mr. Herman was, "Didn't you in one of these conversations ask Mr. Ong, in the absence of Mr. Wong, whether Mr. Wong could not deal in narcotics for you?" (Tr. 542). The witness stated, "Your Honor, I have been told I cannot refer . . ." at which point the witness was interrupted by Judge Brieant who sustained an objection and ordered that Mr. Herman not ask any more questions along that line. The Court, concerned about the prejudice Mr. Herman was generating, cautioned the jury to put the questions out of their minds completely. The Court then directed Mr. Herman, who requested a side bar conference, to "either put another question and finish your cross-examination or you will sit down." (Tr. 543). Mr. Herman then immediately asked, "Did you tell Mr. Ong that you had people who are eager to get narcotics from Johnny Wong?" The Court promptly directed Mr. Herman to take his seat. (Tr. 543).

At a post-trial hearing, defense counsel moved for a new trial on the ground that his cross-examination of Investigator Granelli had been improperly limited. He argued that, in questioning Granelli about the narcotics conversations, he had been attempting to show first that Investigator Granelli was acting coercively and second that Wah had nothing to do with narcotics. Counsel further contended that, if he had been permitted to continue, he would have inquired, for example, about a conversation which Granelli had testified he overheard between Investigator Kibble and Wah, which Investigator Kibble did not later testify to on direct examination. (App. M 5-7).

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it engendered. This omission makes it appear that Judge Brieant had made his ruling clear to counsel only once before ordering him to be seated, when in fact counsel's misconduct was far more serious. (Br. at 9).

In denying this motion, Judge Brieant noted first that he had made an effort at trial to redact all incriminatory material about narcotics. He noted that the references to narcotics which remained were either not deleted because counsel thought them exculpatory or because of neglect. The Court then went on to recite the improprieties in counsel's cross-examination:

" . . . I think there are some basic rules in the trial of any case, in any Court that I know of, that the Court cannot permit its rulings on objections to be flouted. If somebody asks a question and the Court makes a ruling, the record is then clear, if an objection to that question has been sustained, the attorney has done all that he needs to do and here, in this situation, the record clearly shows that attorney Herman asked a question about narcotics, about an effort on the part of the witness to involve a person in a narcotics deal, an objection was sustained. He came back immediately and reframed the identical question.

'Didn't you in one of those conversations ask Mr. Ong, in the absence of Mr. Wong Wah, whether Mr. Wong Wah couldn't deal in narcotics for you?'

The witness had been admonished previously that he couldn't talk about narcotics, so he tried to assist the Court by saying that he had been told that he couldn't refer—and he was cut off before he mentioned the word 'narcotics.' 'Your Honor, I have been told that I can't refer—'

The Court instructed the witness not to volunteer information and again sustained the objection and specifically instructed Mr. Herman, 'no more questions along this line,' this line being discussions about narcotics.

The jury was then told to disregard the testimony and not to assume the question would call for any affirmative answer, and at that point I said to Mr. Herman, 'No more of this.'

And then Mr. Herman attempted to argue that point in front of the jury. There was no purpose of a side bar conference at that time because it is clear, I think to almost anybody in the practice of law, that when an objection has been sustained to a question there is absolutely no license to come in the back door with the same question reframed, not a first time, but a second time and apparently here a third time.

And Mr. Herman was specifically instructed not to make a speech in front of the jury and put another question and finish the cross-examination or sit down.

What did he do? He came back immediately and asked the same question. I think this would be a third or fourth time.

'Did you tell Mr. Ong that you had people who were eager to get narcotics from Johnny Wong?'

Now, that is the very same identical question which had been asked two times before and as to which an objection had been sustained twice. There was nothing disrespectful about Mr. Herman's manner in doing so. Had there been, the Court would have found it a proper situation for disciplinary action. There was no point in having a side bar conference because had I conducted a side bar conference I would have been compelled to tell Mr. Herman, in effect, 'You know better,' and I did not come down here to criticize or revile or complain about practicing lawyers. It is not my practice to get into controversy with lawyers or threaten lawyers with the contempt power of the Court or given to any acrimony. But one thing is clear to me, when an objection has been sustained twice, no lawyer has the right to come back and ask that very same question the third time around. I won't tolerate it. I have a right to maintain the effectiveness of my evidentiary rulings before the jury and not get into a situation before the jury where my rulings are being

flouted by an attorney or where it appears to the jury that there is a question of who is in charge here." (App. M. 11-14).

Additionally, the Court addressed counsel's rather belated claim of prejudice:

"Mr. Herman had an opportunity for re-cross examination of the next witness. At no time during the trial did Mr. Herman ever, including every side bar conference, discussions that we had in the absence of the jury, ever until today state that there was some particular area that hadn't been covered by the grinding cross-examination of the other attorneys, which was extremely thorough, that had been missed by them, or that he wanted to touch upon." (App. M. 14).

Plainly, Judge Briant's ruling was not error.

The scope of cross-examination is a matter within the sound and broad discretion of the trial court. See *United States v. Finkelstein*, 526 F.2d 517, 528 (2d Cir. 1975); *United States v. Green*, 523 F.2d 229, 237 (2d Cir.), cert. denied, —U.S.— 44 U.S.L.W. 3358 (U.S. Dec. 16, 1975); *United States v. De Marco*, 488 F.2d 828, 831 n.8 (2d Cir. 1973); *United States v. Lewis*, 447 F.2d 134, 139 (2d Cir. 1971); *United States v. Evanchik*, 413 F.2d 950, 953 (2d Cir. 1969); *United States v. Dardi*, 330 F.2d 316, 333 (2d Cir.), cert. denied, 379 U.S. 845 (1964). And here it was, of course, within the equally broad discretion of the trial judge to rule that counsel's questions, which sought to directly inject the issue of narcotics dealings into this case, were far more prejudicial and distracting than they were probative. See *United States v. Green*, *supra*; *United States v. Pacelli*, 521 F.2d 135, 137 (2d Cir. 1975), cert. denied, — U.S. —, 44 U.S.L.W. 3471 (Feb. 23, 1976); *United States v. Kahn*, 472 F.2d 272, 279, 281 (2d Cir.), cert. denied, 411 U.S. 982 (1973); *United States v. Mahler*, 363 F.2d 673, 676-78 (2d Cir. 1966). See also Fed. R. of Evid. 403, *Hamling v. United States*, 418 U.S. 87, 125, 127 (1974).

Despite Judge Briant's efforts to eliminate the potentially inflammatory issue of narcotics from this case, defense counsel persisted in his efforts to thwart the Court's rulings. In that circumstance, Judge Briant cannot be faulted for enforcing his ruling by having counsel who would not comply with obvious directions cease his examination.

But even assuming *arguendo* that other measures should have been taken to deal with counsel's misconduct, it is clear that Wah—against whom there was overwhelming evidence of guilt—suffered no prejudice. First, at the conclusion of Granelli's redirect examination, counsel was given an opportunity to conduct a re-cross examination. At that time counsel could have attempted to ask the witness any questions he did not ask on cross-examination, since the Court in its discretion may permit counsel to inquire as to matters not covered on re-direct. *United States v. Stoeck*, 196 F.2d 276, 280 (3d Cir.), *cert. denied*, 344 U.S. 826 (1952). Apparently satisfied that counsel for co-defendants had covered all the bases, Mr. Herman did not examine Granelli. Having failed to take the opportunity to again examine Granelli, counsel cannot now claim that he was deprived of a right to confront the witness. *Cf. United States v. Badalamente*, 507 F.2d 12, 21-22 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975); *United States v. Finkelstein*, *supra*.

Finally, it is instructive that the next Government witness was Investigator Kibble, who covered almost precisely the same ground on direct as had Investigator Granelli. Yet Mr. Herman asked not a single question on cross-examination. (Tr. 704). This puts to rest the obviously contrived claim that had counsel been able to cross-examine Granelli, he would have focused on the fact that Investigator Granelli had testified on direct that he had overheard a conversation between Kibble and Wah, which Kibble did not mention on his direct. If this matter was as significant as it is now claimed to be, certainly defense counsel would have asked Kibble about the mat-

ter. Moreover, how could ~~the~~ matter have become significant until Investigator Kibba had testified?

## POINT V

### **The prosecutor's summation did not deprive the defendants of a fair trial.**

Employing a tactic which has become commonplace, Ong, whose guilt was overwhelmingly proven, argues that he was deprived of a fair trial by remarks of the prosecutor in summation. Specifically, Ong points to eight instances of alleged misconduct. Each of these claims lack merit; most are utterly frivolous.

Before turning to an examination of the eight claims, it is instructive to note that only three of these alleged errors led to comment by the Court or objection from counsel. That defense counsel found so few of the comments now assigned as outrageous of sufficient moment that they saw fit to object during or after summation is substantial evidence of the insignificance of any impact the comments might have had in the courtroom. *United States v. Canniff*, 521 F.2d 565, 572 (2d Cir. 1975), cert. denied sub nom. *United States v. Benigno*, — U.S.— (1976); *United States v. Sawyer*, 347 F.2d 372, 374 (4th Cir. 1965) (Sobeloff, C.J.). Moreover, as the United States Supreme Court noted in *United States v. Socony-Vacuum Oil Company*, 310 U.S. 150, 238-39 (1940), "... counsel for the defense cannot as a rule remain silent ... and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper or prejudicial." See also *United States v. Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970), aff'd, 402 U.S. 146 (1971). When defense counsel objects to an argument neither during nor after summation, "... an appellate court will reverse only if the summation was so 'extremely inflammatory and prejudicial' ... that allow-

ing the verdict to stand would 'seriously affect the fairness, integrity or public reputation of judicial proceedings' [citations omitted]." *United States v. Briggs*, 457 F.2d 908, 912 (2d Cir.), *cert. denied*, 409 U.S. 986 (1972).

**A. The prosecutor did not improperly express a personal opinion concerning the defendants' guilt.**

Ong argues that the prosecutor improperly expressed a personal opinion concerning the defendants' guilt and injected the credibility of the United States Attorney's Office into the case, when he said:

"Now, this trial has lasted about a week and a half now, and I do not expect to be very long in my remarks to you this morning, because, quite frankly, I think that the evidence in this case speaks very loudly for itself." (Tr. 932).

Ong's claim that this remark was improper is preposterous. There was no intimation that the prosecutor's remarks were based on anything but the evidence already adduced, nor was there any suggestion that the statement was based on any supposed expertise which the jury lacked. An Assistant United States Attorney should always be convinced of the guilt of a defendant before he begins a trial, *DiCarlo v. United States*, 6 F.2d 364, 368 (2d Cir. 1925) (L. Hand, J.), and as an advocate may properly suggest to the jury, once the evidence is in, that the Government has proved its case. *United States v. Sawyer*, *supra*, 347 F.2d at 373 & n.1. See also *Lawn v. United States*, 355 U.S. 339, 359-60 n.15 (1958), and case cited with approval therein; *United States v. Davis*, 487 F.2d 112, 125 (5th Cir. 1973), *cert. denied*, 415 U.S. 981 (1974); *United States v. Greer*, 467 F.2d 1064, 1072 (7th Cir. 1972), *cert. denied*, 410 U.S. 929 (1973); *United States v. Hysohion*, 439 F.2d 274, 277-78 (2d Cir.

1971); *United States v. Meisch*, 370 F.2d 768, 773, 777 (3d Cir. 1966); *Orcbo v. United States*, 293 F.2d 747, 749 & n.1 (9th Cir. 1961), *cert. denied*, 368 U.S. 958 (1962); *Thompson v. United States*, 272 F.2d 919, 921 (5th Cir. 1959); *Henderson v. United States*, 218 F.2d 14, 19 (6th Cir.), *cert. denied*, 349 U.S. 920 (1955), and cases cited therein; *United States v. Holt*, 108 F.2d 365, 369-70 (7th Cir. 1939), *cert. denied*, 309 U.S. 672 (1940). Cf. *United States v. Torres*, 503 F.2d 1120, 1127 (2d Cir. 1974).

In addition the suggestion that the prosecutor's statement injected the credibility of the United States Attorney's Office into the trial is totally belied by the very words uttered.

No objection was made to this remark below.\*

**B. The prosecutor did not invoke the prestige of the Government, and any error was surely cured by the trial judge.**

During his summation, the prosecutor, after detailing at great length the evidence which demonstrated each defendant's guilt, stated:

\*The prosecutor's statement can also be usefully contrasted with Ong's counsel's remarks:

"And in view of Granelli proven lack of memory and lack of credibility since the November 8, 1973 meeting was intentionally not tape recorded, *I truly think that you must find that economic coercion has been shown*. Furthermore, that specific criminal intent has not been proven, and that *you and each of you have no choice as to the seventeen tape recorded bribery counts and the conspiracy counts but to conclude that under all the circumstances of selective, oppressive, repeated harassing enforcement and economic coercion, Mr. Ong's specific criminal intent has not proven beyond a reasonable doubt, and he must therefore be acquitted on these counts as well as on the other counts where no tape recordings have been made and guilt simply has not been proven beyond a reasonable doubt without reference to that defense.*" (Tr. 1021) (emphasis supplied).

"Ladies and gentlemen, the public is represented in this courtroom and has a stake in the outcome of this case.

The United States Government has a deep interest in seeing to it—" (Tr. 966).

Counsel for defendant Young objected, and the Court promptly sustained the objection.

The prosecutor was obviously at this point attempting to emphasize the rather self-evident proposition that the Government, and the public it represents, had an abiding interest in seeing to it that public officials were not bribed. It was, we submit, entirely proper for the prosecutor to argue to the jury the Government's view of the significance to society of enforcing these particular criminal statutes. *Cf. United States v. Wilner*, 523 F.2d 68 (2d Cir. 1975).

This was not an instance, as Ong suggests, in which the prosecutor suggested that the jurors had a pecuniary interest in seeing to it that the defendants were convicted. *Compare United States v. D'Anna*, 450 F.2d 1201, 1205-06 (2d Cir. 1971). Nor was it a case where the prestige of the Government was placed behind the prosecution. *Compare United States v. LaSorsa*, 480 F.2d 522 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973).

But, in any event, if there was any error, it surely could not have been prejudicial. The Court promptly cut off this line of argument by sustaining an objection. Moreover, the Court later instructed the jury that the Government, as a party, was entitled to no more or less consideration than any other party. (Tr. 1112). Finally, to argue that this passing remark of the prosecutor—occurring as it did during the course of a summation which carefully and thoroughly analyzed the overwhelming evidence of the defendants' guilt—suddenly caused the jurors to abandon their dispassionate approach toward the evidence, certainly belittles the capacity of jurors.

### C. The prosecutor did not deprecate the defense.

Ong argues that the prosecutor deprecated the defense by stating that, if no tape recordings had been made, the defendants "would have denied offering or paying any of this money." (Tr. 964). This argument lacks merit.

These remarks of the prosecutor were made during the course of an argument to the jurors that, while it was true that the tape recordings might have impinged to some degree on the defendants' privacy, their use was perfectly legal and essential to effective law enforcement. (Tr. 964-65). The prosecutor argued that, if these recordings had not been made, the defendants would likely have denied offering or paying any money whatever.

This argument by the prosecutor—which is claimed to have suggested something totally foreign to this case—anticipated precisely the argument which Ong's counsel later made in his summation. Mr. Markewich argued that with respect to those bribes that had not been tape recorded, the jury was obliged to acquit. (Tr. 975-76, 978, 979-81, 990-97). He contended that without tape recorded conversation, the testimony of the INS investigators concerning the bribes was uncorroborated and the jury could not convict. (*E.g.*, Tr. 994).

Moreover, aside from the fact that this supposed deprecation meshed perfectly with defense counsel's own argument, no possible prejudice could have been inflicted. The prosecutor's remarks were interrupted by Judge Brieant who cautioned the jury:

"The Court: Excuse me, Mr. Kuriansky [the Assistant United States Attorney], I believe I must strike out that argument. The jury will decide the case as it was presented to them and not some other case they might have had.

I instruct the jury to disregard any suggestion that they speculate about what any defense might have been under other circumstances.

I further instruct the jury, as I will explain to you in greater detail, that the defendant is presumed innocent unless and until proven guilty beyond a reasonable doubt of the crime charged against him, and that he doesn't have to present any defense.

Please go on to something else." (Tr. 964-65).

In light of these cautionary remarks, and the overwhelming evidence of guilt, any error was surely nonprejudicial. See *United States v. White*, 486 F.2d 204, 207 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974).\*

**D. The prosecutor did not improperly ask the jury to consider the defendant's courtroom demeanor.**

To counteract the anticipated defense arguments that the defendants were unsophisticated men who were pressured into offering bribes by the investigators, the prosecutor stated, *inter alia*:

"I submit to you, ladies and gentlemen, that these defendants were not poor, unsophisticated people. Ong, the Secretary of the powerful Hip Sing Association, nation-wide, the Hip Sing Association. Wong, Secretary of the Tai Look Association. Young, Secretary, and by his own admission, boss of the 4,000 members of the Tsung Tsin Association. Hok, manager of at least two gambling houses in his time, and for twenty years associated with illegal gambling in Chinatown.

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\* Ong also argues, citing *United States v. Burse*, Dkt. No. 75-1388, slip op. 2507, 2512 (2d Cir. Mar. 8, 1976), that the prosecutor impugned the integrity of the defense lawyers by implying that they would participate in a sham defense. In *Burse*, the prosecutor referred directly to the defense lawyer by name and argued that he had attempted to have a witness testify in a particular fashion and thereby create a misimpression with the jury. Nothing of the sort was implied or intended here. There was no direct or indirect reference to any attorney or any suggestion that any of the defense attorneys would participate in a knowing fraud on the Court.

The evidence demonstrates overwhelmingly that these were not simple, naive men unaware of what they were doing. They had businesses, illegal businesses to take care of, and they were not above corrupting Government officials to do it.

Please take a good look at all four of the defendants, ladies and gentlemen.

Are these unwary innocents, or are they greedy businessmen willing to be corrupt public officials to insure the success of their illegal businesses?

Were they maltreated or imposed upon by Granelli and Kibble? I submit to you that there is no evidence in this case of that.

I submit to you that those tape recordings make it clear that Granelli and Kibble never approached a single one of these defendants and never pressured them into doing anything." (Tr. 952-53).

Ong complains that the prosecutor's statement, "Please take a good look at all four defendants, ladies and gentlemen," was intended as an invitation to the jurors to assess the defendants courtroom demeanor. This claim lacks substance.

While the cold record cannot convey precisely the impression which the prosecutor's remarks left with the jury, the context of the remarks plainly reveals that, in asking the jury to "look" at the defendants, the prosecutor was requesting the jurors to focus on the evidence against each defendant, not to assess the defendants' courtroom demeanor. That this was so is convincingly demonstrated first by the fact that none of the defendants objected to this statement. Secondly, when Mr. Rosenthal, counsel for Young, suggested in his summation that the prosecutor had asked the jurors to "look" at the defendants and compare their "handsomeness" with certain Government witnesses, Judge Bricant interrupted to say he had no recollection of any reference to the appearance of any defendant. The Court then instructed the jury that, of course, the appearance of a person had no bearing on his guilt or innocence. (Tr. 1091-92). Thirdly, in

his rebuttal summation the prosecutor stated unequivocally that his request of the jurors to "look" at the defendants was meant only as a reference to the evidence—the defendants' words, as recorded, and their actions. (Tr. 1094).

**E. The prosecutor was not in error in referring to FBI agent Henry's reports.**

Ong argues it was error for the prosecutor to make reference to "over fifty" consent forms and to "Boyd Henry's 150 pages of bribery reports." (Br. at 31). He contends that, since these items were Jencks Act material and inadmissible, the prosecutor referred to matters not in evidence. This claim is utterly frivolous.

What Ong conveniently overlooks is the fact both that the consent forms and the agent's 150 pages of reports were directly referred to during trial testimony (*E.g.*, 729, 799-801, 821, 825).<sup>\*</sup> Indeed, Mr. Markewich, Ong's counsel, himself elicited the fact that Agent Henry had prepared approximately 150 pages of reports (Tr. 775), as did Mr. Cuddihy, defendant Hom's counsel. (Tr. 807).

Not surprisingly, no objections were taken at trial to these remarks.

**F. The prosecutor properly argued that the consent forms signed by the investigators prior to the recording of their conversations were "standard forms."**

During defendant Young's summation, it was argued that the consent forms signed by the INS agents before their conversations were taped indicated from their wording that the FBI Agents, who required the forms to be signed, were suspicious of the investigators. (Tr. 1073-

<sup>\*</sup> Seven of the "consent forms" were received in evidence as defendant Young exhibits 1-1 to 1-7. (Tr. 821-22).

75).<sup>\*</sup> In his rebuttal argument, the Assistant United States Attorney replied that the form was a "standard" form used whenever the FBI consensually recorded a person and that the wording of the form did not therefore reflect any distrust of the INS investigators.

Ong argues that there was nothing in the record to support the argument that these were "standard" forms. This claim is meritless.

FBI Agent Henry testified that, before the conversation of the investigators could be recorded, authorization was required from the Department of Justice, and the investigators had to give their written consent. (Tr. 729-31, 841). Consent forms had to be executed each time the investigators wore recording devices. (Tr. 799-800). The numerous consent forms prepared in this case were virtually identical in every respect. (Tr. 821-25, 839).

Based on this testimony and the admission of the consent forms themselves into evidence, it was perfectly permissible to argue the inference that the forms were the standard consent forms used by the FBI—as they, in fact, were. It is well settled that "within broad limits counsel for both sides are entitled to argue the inferences which they wish the jury to draw from the evidence." *United States v. Dibrizzi*, 393 F.2d 642, 646 (2d Cir. 1968); *United States v. Gerry*, 515 F.2d 130, 144 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975). For, after all, "[a] prosecuting attorney is not an automaton whose role on summation is limited to parroting facts already before the jury." *United States v. Wilner*, 523 F.2d 68, 74 (2d Cir. 1975).

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<sup>\*</sup> Counsel then went on to argue—clearly, improperly and without the slightest support in the record—that eight or nine years ago the FBI had not bothered to get consents when they taped a prominent American. (Tr. 1075). This type of improper argument was later repeated. (See Tr. 1082, 1088).

**G. The characterization of Ong as "Chinatown's chief corrupter for twenty years" was proper.**

During his rebuttal summation, the prosecutor referred to Ong as "Chinatown's chief corrupter for twenty years." (Tr. 1095). Ong argues that, while there was evidence that he had been a corrupter for twenty years, his position in the Chinatown hierarchy of corrupters had not been established by the evidence. (Br. 34-35). This claim is frivolous.

Again, this supposedly prejudicial remark was of such little consequence below that no objection was raised. Moreover, since in a recorded conversation on November 28, 1973 between Ong, Wah, and the investigators, Ong commented that he had been paying bribes to the police for twenty years and was "the guy" with the police officers in the Fifth Precinct (GX 5, at 7-9),\* the appellation was hardly more than descriptive. See *Myers v. United States*, 49 F.2d 230, 231-32 (4th Cir.), cert. denied, 283 U.S. 866 (1931).

**H. The prosecutor did not improperly intimate that he had superior knowledge of Ong's narcotic dealings.**

Although the trial judge repeatedly warned counsel to avoid references to the defendants' narcotics dealings, counsel for Ong ignored the Court's admonitions and argued in summation:

"It is absurd to believe that Ong was educated in narcotics in light of the fact that on February 6, 1974, after having a discussion with the INS people in which he sort of led them on, a discussion about narcotics—" (Tr. 1017).

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\* Ong also told Granelli that he made a \$5000 payment to a police inspector for the First Division (Tr. 106); that "the 5th Precinct just takes coffee money. My money goes up" (Tr. 229); that he had provided liquor and oriental women for a former chief of detectives (Tr. 210); and that he had purchased an airline ticket for vacation purposes for former Police Commissioner Murphy (Tr. 96).

This argument by Mr. Markewich was plainly improper and unfair, particularly since the Government had been precluded from introducing narcotics-related conversations which would have been devastating to Ong.\* Accordingly, the prosecutor objected, stating "Your Honor, if this subject is opened up—" (Tr. 1017), and the Court cautioned Mr. Markewich that "[t]he issue of narcotics is not properly part of this prosecution . . . leave out any discussions about narcotics. This is not a case involving narcotics." (Tr. 1017-18).

Incredibly, Ong ignores the misconduct of his own attorney and argues that the prosecutor's objection intimidated to the jury that the Government had other information concerning his narcotics related activities. If there was any error it was "invited" by defense counsel's conduct, see *United States v. Artega-Limones*, 529 F.2d 1183, 1195 (5th Cir. 1976); *Trawick v. Manhattan Life Insurance Co.*, 484 F.2d 535, 539 (5th Cir. 1973); cf. *United States v. Agueci*, 310 F.2d 817, 840 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963). Ong ought not be permitted to profit from his own counsel's improprieties.

## POINT VI

**The sentence imposed here in all respects proper.**

Defendants raise a variety of complaints concerning their sentencing. Hom contends (1) that his sentence was too harsh, and (2) that the Court should remand for resentencing under the new sentencing procedures. Ong argues (1) that the trial judge improperly refused to consider "cultural factors" which led to his offense, and (2) that the Court failed to give proper deference to a State court judge's noncustodial sentence of some of the defendants in a State bribery case. These claims are all meritless.

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\* For example, the Court excluded Ong's recorded statements to the investigators on January 30, 1974 that he had bribed District Attorney Thomas Mackell to fix narcotics cases. (See Tr. 186 and unredacted Transcript of Jan. 30, 1974 conversation, at 9).

The settled law in this Circuit is that:

"... absent reliance on improper considerations, see *United States v. Mitchell*, 392 F.2d 214, 217 (2d Cir. 1968) (Kaufman, J., concurring), or materially incorrect information, see *United States v. Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970), a sentence within statutory limits is not reviewable. See, e.g., *United States v. Brown*, 479 F.2d 1170 (2d Cir. 1973); *United States v. McCord*, 466 F.2d 17, 18-19 (2d Cir. 1972); *United States v. Dzialak*, 441 F.2d 212, 218 (2d Cir.), cert. denied, 404 U.S. 883 (1971)." *United States v. Velasquez*, 482 F.2d 139, 142 (2d Cir. 1973).

See also *Dorszyski v. United States*, 418 U.S. 424, 440-41 (1974); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Gore v. United States*, 357 U.S. 386, 393 (1958); *United States v. Glazer*, Dkt. No. 75-1213, slip op. 2201, 2213 (2d Cir., Mar. 1, 1976); *United States v. Goldberg*, 527 F.2d 165, 173 (2d Cir. 1975). In the instant case, the sentence of each defendant was well within statutory limits. The defendants were all convicted of multiple violations of 18 U.S.C. § 201(b), which provides for a maximum sentence of 15 years.

While the sentences were concededly not slaps on the wrist, they were not intended to be. Judge Brieant stated that these sentences were meted out both because of the serious attempts made at corrupting federal officers and because of the need to alert the public, through substantial sentences, that such behavior would not be tolerated in the future. The Court said:

"I believe I should state for the record, so that the Court's thinking in this matter will be clear, that the Court regards the purpose of sentence here as being one of general deterrence. It is a basic rule, established by Congress, that thou shalt not bribe Federal officials, and the giver of a bribe is just as evil as the taker of a bribe.

Permitting bribery of those who have to make decisions, whether it is the decision of a cabinet

officer or the decision of an Immigration inspector as to whether or not he will walk into a gambling house as part of his duties to search for illegal aliens or not or whether he will stand outside the door or not—every one of those, when they are altered by bribery, undermines the system of justice in this country, and it undermines the equality of the administration of the laws.

We simply cannot permit, no matter how much we might feel sympathetic, no matter how we would like to accommodate the desires of defendants and their attorneys—we cannot permit commonplace, local bribery of precinct policemen to condone gambling to slop over, in effect, into the administration of the Federal Government, and this Court must regard and does regard the bribery of Immigration officials as being a much more serious moral lapse than what has been talked about in connection with the Nadjari situation.

The Court wishes, by imposing sentence, to make it clear to anyone else who is considering bribing an Immigration official or anybody else, that this is a serious felony and carries a substantial penalty." (Minutes of sentencing, Feb. 11, 1976, at 35-36).

The length of defendants' sentences are plainly unreviewable.

No less persuasive is the argument that these defendants should receive the benefit of new sentencing procedures not yet in effect. It is simply beyond the pale to suggest that all defendants previously sentenced under existing procedures are entitled to resentencing under the new procedures. Moreover, one of the principal objectives of the new rules—to have the trial judge state his reasons for the sentences imposed—was fully satisfied in this case.

The claim that Judge Briant improperly refused to consider "cultural factors," allegedly "the history of official corruption in Chinatown and its effect on the

Chinese people living there," which "caused" the defendants to commit their crimes (Ong Br. at 40) is patently frivolous. First, the suggestion that it was the defendants' "culture" which caused this crime is an insult to hundreds of thousands of law-abiding Chinese-Americans. Second, even assuming that there was a cultural group in this country which because of past history was prone to commit certain types of crime, would this warrant less severe sentences or more severe sentences in order to effect deterrence? Third, these defendants made no showing that they were motivated by any "factor" but blatant greed.

Finally, defendants' argument that Judge Brieant failed to give sufficient weight to the noncustodial sentence imposed by a State court judge upon Ong and Wah in a prior bribery case does not raise a reviewable issue. The matter was mentioned to Judge Brieant; he considered it; and he saw fit to view bribery of federal officials as a more serious offense requiring a substantial jail sentence. The fact that a State judge viewed bribery of a local police officer as a less serious offense certainly was not binding on Judge Brieant.

## CONCLUSION

**The judgments of conviction should be affirmed.**

ROBERT B. FISKE, JR.,  
*United States Attorney for the  
 Southern District of New York,  
 Attorney for the United States  
 of America.*

GREGORY J. POTTER,  
 LAWRENCE B. PEDOWITZ,  
 JOHN C. SABETTA,  
*Assistant United States Attorneys,  
 Of Counsel.*



AFFIDAVIT OF MAILING

STATE OF NEW YORK )  
COUNTY OF NEW YORK) ss.:

GREGORY J. POTTER, being duly sworn,  
deposes and says that he is employed in the office of the  
United States Attorney for the Southern District of New York.

That on the 13th day of May, 1976  
he served a copy of the within  
by placing the same in a properly postpaid franked envelope  
addressed:

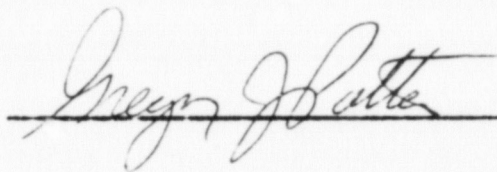
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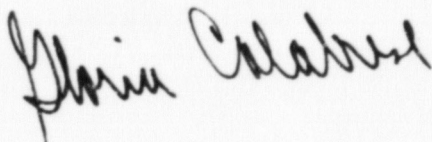
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And deponent further says that he sealed the said envelope  
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the United States Courthouse, Foley Square,  
Borough of Manhattan, City of New York.



Sworn to before me this

13 day of 1976



GLORIA CALABRESE  
Notary Public, State of New York  
No. 24-0535340  
Qualified in Kings County  
Commission Expires March 30, 1977